Supreme Court, U.S.
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No. 93-1065

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

BILL HARTBARGER,

Petitioner,

v.

FRANK PAXTON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW MEXICO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether this Court has jurisdiction to issue its Writ of Certiorari because (1) it was untimely filed and (2) Hartbarger is not the proper party and the Trustee in Bankruptcy is not a party.

Whether the Court should exercise its discretion and issue a Writ of Certiorari when the federal law is settled and there is no important federal question.

PARTIES

Petitioner, Bill Hartbarger ("Hartbarger"), is an individual resident of the State of New Mexico.

Respondent, Frank Paxton Company, is a Delaware corporation whose headquarters is in Kansas City, Missouri. Its parent company (acquisition company) is Paxton, Inc., an Oregon corporation headquartered in Klamath Falls, Oregon. Frank Paxton Company has wholly owned subsidiaries, but no other subsidiaries. Paxton, Inc. is owned by Jeld-Wen Corporation and a private investor.

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TO THE HONORABLE SUPREME COURT:

The Respondent, Frank Paxton Company, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner Hartbarger.

OPINION BELOW

The decision below is published as *Bill Hartbarger v. Frank Paxton Co.*, 857 P.2d 776; 1993 N.M. LEXIS 187; 32 N.M. St. B. Bull. 635; 8 BNA IER CAS 1114.

JURISDICTION OF THE COURT

The decision of the New Mexico Supreme Court was filed June 14, 1993 (Petitioner's Appendix at 1) and corrected and refiled July 21, 1993 (Petitioner's Appendix at 23). The New Mexico Supreme Court issued its mandate on July 21, 1993. A second Motion for Reconsideration and Rehearing was filed in the New Mexico Supreme Court by Hartbarger on August 5, 1993, raising (among other points) an issue as to the Fourteenth Amendment (Petitioner's Appendix at 81, 82). The lower (trial) court issued its Final Judgment on Mandate on August 31, 1993, reserving jurisdiction to consider appellate costs. The New Mexico Supreme Court issued an order on September 15, 1993 (Petitioner's Appendix at 46) amending its opinion of June 14, 1993. Hartbarger's August 5, 1993 Motion was denied without decision or opinion on September 16, 1993 (Petitioner's Appendix at 47). The lower court entered its Amended Final Judgment on Mandate (which assessed appellate costs) on September 27, 1993. On September 30, 1993, Petitioner filed a Third Motion and Memorandum Brief for Reconsideration and Rehearing (Petitioner's Appendix at 84) which contained no Federal questions. Petitioner's Third Motion was denied on October 4, 1993, without discussion.

Petitioner and his wife (Billy Gene and Geraldine M. Hartbarger) filed a Chapter 7 Petition in the United States Bankruptcy Court for the District of New Mexico on October 5, 1993 (Cause No. 7-91-12970 MA). That case is still pending. The trustee is Bill J. Sholer, who is not a party.

The jurisdiction of this Court is disputed in that it appears under Rule 13 of the Supreme Court Rules that the filing must be made within ninety days of the entry of the judgment. Since the Third Motion for Rehearing filed on September 30, 1993, was not directed to the lower court and contained no federal questions it would appear that the appeal should have been filed within ninety days of the opinion filed June 14, 1993, or, at the latest, ninety days after the September 15, 1993 order amending the opinion or the September 16, 1993 order denying the motion for reconsideration that raised the federal constitutional issue. The amended final judgment in the trial court below was entered September 27, 1993, and the last decision of the New Mexico Supreme Court was on September 15, 1993. The Supreme Court Rules seem to clearly focus on the last decision to be rendered (not the mandate), and final judgment of the court below if a motion for rehearing is filed in the *lower* court (which did not happen in this case). Petitioner did not file his Petition until December 30, 1993. It was received by Respondent's counsel on January 3, 1994.

It is also raised (see Point Two) that the appeal was an asset of the bankruptcy estate and under a Chapter 7 Petition, and the trustee is the proper person to file the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Hartbarger was a salesman for Frank Paxton Company. Just before his termination, Hartbarger's commission rate was 2½ percent, while the commission of Paxton's other Albuquerque sales persons was two percent (Decision, Petitioner's Appendix at 24). At a March meeting, Al Crownover (Paxton's Albuquerque manager) gave Hartbarger a written and oral evaluation. Hartbarger testified Crownover told him he was (1) not putting forth 100 per-

cent effort, (2) not cooperationg, (3) not observing company policies, (4) not taking the initiative (had to be forced), and (5) his dependability was lacking. Crownover told Hartbarger "it's going to cost you another half percent of your commission". Hartbarger told Crownover that he could not take a cut like that. Crownover offered Hartbarger three choices: accept the cut, resign, or be fired. After a pause, Hartbarger replied that he could not take the first two choices, and Crownover said "then I guess you're fired". The parties agreed that Paxton could change the commission rate at any time and did not need the employee's permission to do so, but Hartbarger argued that implied in the choices presented to him was an expectation for productive negotiations and that there was no good cause for an abrupt firing (Decision, Petitioner's Appendix at 25).

Respondent has no disagreement with the dates set forth in Petitioner's Statement of the Case.

Respondent objects to the characterization in the Petitioner's Statement of the Case that (1) the New Mexico Supreme Court "reweighed, reinterpreted, and minimized the evidence"; (2) that the decision added "new" requirements; and (3) other similar comments on the facts.

The appendices provided by the Petitioner include the appellate decisions. There are errors in these appendices that relate to Petitioner's points and those errors are set forth in Respondent's Appendix. The Respondent has added detail on the mandate and the final judgments of the lower (trial) court and the Petitioner's bankruptcy filing in the section on Jurisdiction of the Court.

SUMMARY OF THE ARGUMENT

1. The Petition for Writ of Certiorari was not timely filed.

2. The Petitioner is not the proper party. The claim is part of a bankruptcy estate and the Trustee in Bankruptcy is the proper party.

3. It is well settled that the Seventh Amendment does not apply to the States.

4. The prohibition of the Seventh Amendment against judicial re-examination of jury findings in civil cases is not so fundamental to the American system of justice as to be required of the state courts by due process and in any event does not preclude even the federal courts from rulings regarding the legal sufficiency of the evidence.

5. The New Mexico Supreme Court did not re-examine the facts tried by the jury.

6. The New Mexico Supreme Court did not modify the law of implied contracts.

ARGUMENTS AND AUTHORITIES

I.
THE PETITION WAS NOT TIMELY FILED.

Rule 13 of the Supreme Court Rules states that a petition for writ of certiorari to review a judgment shall be deemed on time when it is filed with the Clerk of this Court within ninety days after the entry of the judgment. The opinion of the New Mexico Supreme Court was filed on June 14, 1993, with the last correction to the opinion made on September 15, 1993 (Petitioner's Appendix at 46). The Amended Final Judgment on mandate was filed

by the trial court on September 27, 1993. The Petitioner filed a Third Motion for Rehearing in the New Mexico Supreme Court on September 30, 1993 (Petitioner's Appendix at 84) which was denied without discussion on October 4, 1993. This Third Motion raised no federal questions and was not addressed to the trial court and is therefore not a final judgment or motion for rehearing in the lower court for purpose of the Rule.

The Petitioner's ninety days should run from June 14, 1993 (or the latest correction on September 15, 1993), since the judgment after that date was pursuant to the mandate. Even if the time were to run from the Amended Final Judgment on Mandate of the lower court (September 27, 1993), the Petition was not timely filed.

II.
PETITIONER IS NOT THE PROPER PARTY.

Petitioner filed a Petition in Bankruptcy on October 5, 1993. That bankruptcy has been pending. Hartbarger's cause of action and any expected recovery is an asset of the bankruptcy estate. *In Re Hooker Investments, Inc.*, 232 C.B.C.2d 588 (Bkty. Ct. S.D.N.Y. 1990). Hartbarger's cause of action became property of his bankruptcy estate upon filing of that bankruptcy (11 U.S.C. §541), and the only person authorized to act with respect to that cause of action is the trustee as representative of the estate pursuant to 11 U.S.C. §323. *See also*, Bankruptcy Rule 6009, which gives the trustee the right to prosecute any pending action or proceeding by the debtor.

III.

IT HAS LONG BEEN SETTLED THAT THE SEVENTH AMENDMENT IS NOT APPLICABLE TO THE STATE COURTS.

In addition to the plain language of the Seventh Amendment ("Courts of the United States") and the cases cited by Petitioner, other cases of this Court have long recognized that, while the Seventh Amendment is controlling in Federal courts, it does not apply to proceedings in State courts. *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, at 377-378 (1912).

In discussing the propositions that (1) the first ten Amendments, including of course the Seventh, are not concerned with state action and deal only with federal action and (2) the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same, this Court has stated:

> So completely and conclusively have both these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the exactment of laws by Congress and proceedings in the Federal courts, and by state constitutions and state enactments and proceedings in state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning.

Minn. & St. Louis R.R. v. Bombolis, 241 U.S. 211 at 217 (1916).

It would seem that the point has long been settled against Petitioner's position.

IV.

THE SEVENTH AMENDMENT PROHIBITION OF REEXAMINATION OF JURY FINDINGS IN CIVIL CASES IS NOT FUNDAMENTAL TO THE AMERICAN SYSTEM OF JUSTICE AND IN ANY EVENT DOES NOT PRECLUDE THE REVERSAL OF A JURY VERDICT FOR LACK OF SUBSTANTIAL EVIDENCE.

In *Melancon v. McKeithen*, 345 F.Supp. 1025 at 1045 (E.D. La. 1972) *aff'd*, 409 U.S. 943, a three judge district court held that jury trials in civil cases and the prohibition of judicial re-examination of jury findings in civil cases, are not so fundamental to the American system of justice as to be required of the state courts by due process. This Court affirmed that decision.

Even the *Federal* Courts under the Seventh Amendment are not required to respect a jury verdict that does not rest on legally sufficient evidence. Since *Slocum, supra,* this Court has developed a less restrictive interpretation that the Seventh Amendment does not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it ties them to the common law system of pleading or the specific rules of evidence then prevailing *Galloway v. United States,* 319 U.S. 372 at 390 (1943). The contention that the Seventh Amendment deprives federal courts of power to direct a verdict for insufficiency of evidence has been foreclosed by repeated decisions made by the Supreme Court consistently for nearly a century. *Galloway, supra* at 389. Nothing in the Seventh Amendment requires that it should be allowed to join forces with the jury system to bring about a judg-

ment based on sheer speculation. The guaranty of the Seventh Amendment requires only that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. *Galloway, supra* at 396.

Even if the Seventh Amendment were applied to the states in state law cases, the more modern view allows that the Federal Court can direct a verdict or set aside a jury verdict as a matter of law where the evidence is legally insufficient.

V.

THE NEW MEXICO SUPREME COURT DID NOT RE-WEIGH AND REINTERPRET THE FACTS, BUT SIMPLY FOUND NO EVIDENCE TO SUPPORT THE JURY VERDICT.

This is a case where the reviewing state court unanimously found no evidence to support a jury verdict for breach of implied employment contract. The New Mexico Supreme Court did not "re-weigh" and "re-interpret" the evidence as claimed. The New Mexico Supreme Court recognized that:

> On appeal, we resolve all disputed facts in favor of the successful party, indulge all reasonable inferences in support of a verdict, and disregard all evidences and inferences to the contrary.
>
> (Opinion July 21, 1993 at Decision, Petitioner's Appendix at 36)

New Mexico is an "at-will" employment state. New Mexico courts have long adhered to the rule that an employee is terminable by an employer "at will", either without cause or for a specific reason in the absence of a contract of employment for a definite term. *Vigil v. Arzola,* 102 N.M. 682 at 685, 699 P.2d 613 (1983).

Petitioner at page 17 of his Petition refers to Exhibit 38 and states "Exhibit 38 referred to a policy of insuring employment for a lifetime". This is a mischaracterization of the contents of that Exhibit. That Exhibit is an inter-office memo written by Mr. Don Moreland and dated 20 January 1987 (prior to Hartbarger's termination in March, 1987). That memo concerns a new policy that those who are *promoted* and fail will not be returned to another job. The relevant portions of the text follow (the ellipses are in the original document and do not reflect omitted material):

> In order to compete in today's tough, competitive climate . . . . Paxton can no longer continue the policy of "finding a position" to fit the employee for a working "life-time". Old line companies that have had this philosophy and haven't adjusted are going broke and being bought for peanuts and being liquidated or reorganized. Who loses besides the stockholders? The employees, customers and suppliers.
>
> So . . . . if an employee bucks for promotion and later changes his/her mind or can't or won't do the job as required, ... no other position is to be awarded. Invariably they end up filling a spot which should have been kept open for training of new, aggressive future replacements. Not only that . . . they become marginal at best, have a "ride-it-out" attitude and drag every new employee down to their level with bad work habits. Of course exceptions will be made for health, accidents, etc.
>
> (Plaintiff's Trial Exhibit 38)

The New Mexico Supreme Court reviewed all the evidence and its discussions of the evidence are contained in their decision. The New Mexico Supreme Court looked only to see if the evidence was sufficient to support a finding that Paxton, by its course of conduct, evidenced an intention to discharge Hartbarger only for just cause.

After reviewing all the evidence, it found the evidence was not sufficient to support a finding of an implied contract.

> Viewing all the circumstances of this employment relationship, we hold that the evidence does not support a finding that Paxton made an offer or promise sufficiently explicit to establish an implied contract. There was no representation sufficiently explicit to constitute an offer not to terminate Hartbarger except for just cause, thus there could be no implied contract to that effect. Therefore we reverse the judgment against Paxton and remand with instructions to enter judgment in Paxton's favor.
>
> (Opinion of July 21, 1993; Petitioner's Appendix at 43)

VI.

THE NEW MEXICO SUPREME COURT DID NOT CHANGE THE RULE OF LAW IN THIS CASE.

The New Mexico Supreme Court did *not* change the rule of law in this case, but merely applied prior law to the evidence.

> In examining implied employment contract cases, we always have required that the *promise* claimed to have altered the presumed at-will term be *sufficiently explicit* to give rise to reasonable expectations of termination for good cause only.
>
> (Opinion of July 21, 1993; Petitioner's Appendix at 35, extraneous "a" deleted as it is a typographical error not in the original document.)

Chief Justice Ransom of the New Mexico Supreme Court, who authored the State Court Opinion below, also authored the prior implied contract case of *Kestenbaum*

v. Pennzoil Co., 108 N.M. 20, 766 P.2d 280 (1988), *cert. denied*, 490 U.S. 1109 (1989) which was cited by Petitioner as the existing law. In *Kestenbaum*, there was explicit evidence of an undisputed promise altering at-will employment. It was *uncontroverted* in *Kestenbaum* that Kestenbaum's immediate supervisor, during the initial employment negotiations, made it clear that the employment would be long term and permanent ". . . as long as Kestenbaum did his job." *Kestenbaum, supra* at 25. There were no such promises negotiated by Hartbarger.

The decision in Hartbarger's case did not change the law of implied contract in New Mexico, and consequently there was no violation of Mr. Hartbarger's constitutional rights in setting aside the judgment without a new trial.

CONCLUSION AND PRAYER

Aside from the jurisdictional questions related to timely filing and the right of Mr. Hartbarger to file a petition once the case was an asset of a bankruptcy estate, there is no question of federal law that has not been previously decided against Petitioner.

Frank Paxton Company prays that the Court deny Hartbarger's Petition for Writ of Certiorari.

Respectfully submitted,

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February 1, 1994

APPENDIX

ERRORS IN PETITIONER'S APPENDICES

There are several errors, including missing portions of opinions, in the Petitioner's Appendix. Some are not relevant to the points in the Petition, but the following relate to key points:

Appendix 13, third line of the second paragraph should read "The presumed at-will relationship be explicit." (*not* "the presumed at-will term explicit.")

Appendix 28, fifth line of the second paragraph should read "mutual assent", *not* "mutual asset".

Appendix 33, the third line of the first paragraph and the second line of the second paragraph should read "employer's assent", *not* "employer's asset".

Appendix 34, citation to *Sheets v. Knight* should be 779 P.2d, *not* 799 P.2d.

Appendix 39, paragraph 1, fifth sentence from the bottom should read "employees without a good reason as establishing that", *not* "employees without a good reason as any indication that".

Appendix 42, second paragraph, last word on the fifth line should be "as" *not* "any".